Kaiser Aluminum & Chemical Corporation *and* **Douglas G. Ferguson.** Case 6-CA-14472

December 1, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On May 4, 1982, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and Respondent filed an opposition to the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and the opposition thereto and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

BENJAMIN SCHLESINGER, Administrative Law Judge: Charging Party Douglas G. Ferguson was suspended from work for 25 days by his Employer, Respondent Kaiser Aluminum & Chemical Corporation[1] commencing on March 6, 1981.[2] The General Counsel contends that Ferguson, who was active as a vice president, steward, and conmitteeman of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local Union 1186 (herein called the Union),[3] was disciplined in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* Respondent contends, on the other hand, that Ferguson's union or concerted and protected activities had nothing to do with its decision; that Ferguson was disciplined for filing a false statement of his time worked; and that, in any event, Ferguson and his union representatives agreed with Respondent to settle Ferguson's grievance under the Respondent-Union collective-bargaining agreement, which should be deferred to and act as a bar to this proceeding pursuant to *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).[4]

The Union and Respondent negotiated their most recent agreement in late 1980. One of the most hard-fought demands was that of Respondent, which desired to reduce the incentive pay increment for higher-than-standard production from 150 percent to 125 percent, while raising the standard above which incentive pay would be earned. The union committee of nine members, including Ferguson, agreed to neither proposal; but Respondent, unsuccessful in its demands, insisted it would strictly enforce its current rules and regulations and would stop two employee practices—"pegging" and "banking"—which, it believed, were hampering the efficient functioning of its incentive pay system. Under the former practice, employees would perform only enough work to produce the number of items required for employees to be paid their standard wages, resulting in Respondent's retention of a superficially low incentive figure, not truly reflecting its employees' production skills. Under the latter practice, employees would work up to their capabilities for certain periods of time but not accurately record all of their work on their timesheets for the time period worked, "banking" the remainder of their work for periods of idleness (either willful or because of machine downtime) and retaining their incentive pay, when they should normally be paid standard, not incentive wages. This practice, too, would keep the production rates at which Respondent computed incentive pay at an unreasonably low level.

True to Respondent's word, it announced in a letter to all employees, dated December 9, 1980, that:

> *Effective Monday, December 14, 1980, employees caught "banking" will be disciplined in accordance with the Rules of Conduct regarding falsification of Company records. The penalty for violation of this rule is a written warning and a five (5) day suspension prior to discharge.* Various auditing and control procedures have been established to monitor payroll time cards to ensure this does not occur.

[1] Respondent, a California corporation with its principal office in Oakland, California, and a facility in Erie, Pennsylvania, the facility involved herein, is engaged in the manufacture and nonretail sale of aluminum dies and parts and chemical products. During the 12-month period prior to April 1, 1981, Respondent, in the course and conduct of its operations, purchased and received at its Erie facility products, goods, and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Pennsylvania and sold and shipped from its Erie facility products, goods, and services valued in excess of $50,000 directly to points located outside of the Commonwealth of Pennsylvania. I conclude, and Respondent admits, that Respondent is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act.

[2] All dates refer to the year 1981, unless otherwise stated.

[3] Respondent admits and I conclude that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[4] The relevant docket entries are as follows: Ferguson filed his unfair labor practice charge on April 20, 1981, and amended it on June 17; the complaint issued on June 25, 1981; and the hearing was held in Erie, Pennsylvania, on February 18, 1982.

There is no question that on March 3, 1981, Ferguson turned in a timecard reporting that in 12 minutes he produced 122 pieces of a particular item. That amounts to in excess of 900 percent of the norm on which incentive is based, and Ferguson readily conceded that he (and his machine) were incapable of such high production. But Respondent claimed that the false entry was no "mistake," as Ferguson claimed, but that he was "banking" his production for a later inactive period of the day, and his plans were thwarted when he was suddenly called to, or remembered, a union meeting, interrupting his workday after only 4 hours of work. For "banking," Respondent contends, Ferguson was initially, on March 6, suspended for 5 days prior to discharge, discharged on March 12 in a second-step grievance procedure, and later on March 20 suspended for 25 days pursuant to a settlement agreement made at a third-step grievance meeting.

The General Counsel argues, however, that (1) this was an innocent mistake, and mistakes had been permitted to be corrected in the past; and (2) even if there were no mistake, Respondent used the timecard as a pretext to conceal its otherwise illegal motivation. As to point (1), I credit Respondent's witnesses as to their sincere belief that the false report was no mistake. Ferguson's timecard shows that he started a particular setup job at 18.5 hours[5] and started the incentive job in question at 18.8 hours, ending his workday at 19 hours. Ferguson explained that the entries of both "18.5" and "18.8" were erroneous and should have correctly been recorded as "17.5" and "17.8," respectively. While it may be possible that Ferguson looked at the timeclock on two separate occasions and misread it both times, as he explained to Respondent's representatives that he did, it was not unreasonable for Respondent to distrust that explanation and deem it unlikely and improbable. Rather, I found the testimony of Gary Eckert, Respondent's employee relations superintendent, particularly compelling in showing Respondent's sincere belief that Ferguson ought not to have been believed, relying on Ferguson's failure to give immediate explanation at his first interview; Respondent's investigation which revealed that Ferguson may have improperly recorded certain "try out" time earlier the same day, and that, even if Ferguson had not made his "mistake," the timecard would still have been erroneous; and its conclusion that, because of Ferguson's failure to remember his union meeting until later in the day, his plans to "bank" his work were thwarted.

Any doubt is dispelled by the settlement of the grievance, in which Ferguson accepted Respondent's position that he was, in fact, banking. The General Counsel argues, however, based on Ferguson's testimony, that he admitted only to making a mistake. I reject Ferguson's testimony. The settlement agreement stipulates: "The parties to this grievance also recognize the grievant is guilty as stated and that banking and/or falsification of Company reocrds [sic] cannot and will not be tolerated." Ferguson accepted that statement, and his attempt to explain it away flies in the face of the agreement's clear words.[6]

Finally, it is true that Respondent had permitted employees to correct their mistakes in the past, but those either occurred long before Respondent announced its new policy of strictly enforcing its rule against falsification of timecards, of which "banking" was part of the problem, or involved errors detrimental to the employee or errors which caused no harm to either employee or Respondent. Further, I credit Respondent's explanation that it permitted mistakes to be corrected only when they were inadvertent, not false, as it believed herein. Finally, the General Counsel relies on Respondent's permission to Ferguson to correct another error he made on April 15. I reject the General Counsel's argument that such permission should be construed as an admission that Respondent wrongfully accused Ferguson of falsifying his timecard on March 6. Rather, it would suggest that Respondent was not disposed to discipline Ferguson because of his protected conduct but because of its legitimate belief that Ferguson was violating Respondent's rules. In any event, the later error made by Ferguson was a harmless one, resulting in no increase of his pay.

Turning to item (2), the General Counsel makes numerous arguments to support the claim that Ferguson's banking was merely a pretext to discipline him for his union and concerted and protected activities. I am inclined to believe the testimony of David Ludwig, the union department steward, that George Nickerson, Ferguson's immediate supervisor, had stated that Respondent was "drooling" over the predicament in which Ferguson found himself and that Respondent could have picked no better employee to whom to demonstrate its new hardened policy.[7] Further, the settlement agreement recites: "As a union official he [Ferguson] has a greater responsibility and therefore can be held more accountable for his actions than the employee he represents." Although this may be interpreted as an acknowledgment that Ferguson, as a union official, was better informed of Respondent's policies than an ordinary employee, I find, at least arguably, that the grievance against Ferguson was processed vigorously because, as a union representative, he was a better example for the employees than if he had not been entrusted with any union duties and responsibilities. His selection is not, therefore, protected; rather, without more, I would find a violation herein and do find a minimal *prima facie* case on behalf of the General Counsel.[8]

[5] The time records are maintained on military time: 18 hours represents 6 p.m.; minutes are reflected by tenths of an hour.

[6] Ferguson insisted that he was never charged by Respondent with "banking." The settlement agreement and his own grievance forms show that his testimony is unreliable; and I have not credited it unless corroborated by other reliable witnesses.

[7] I do not credit Ferguson's addition (which Ludwig did not corroborate) that Nickerson stated that he told Respondent's representatives that he knew Ferguson was not that dumb, inferring that at least Nickerson acknowledged that Ferguson had merely made a mistake, rather than deliberately falsifying his time record. Nor do I find that Eckert stated that Ferguson had been causing Respondent trouble and that some of the foremen were looking closely at Ferguson's performance, a statement which Eckert credibly denied.

[8] I reject all other theories posited by the General Counsel. It is true that on March 6 Ferguson had threatened to file an unfair labor practice

Continued

But, as appears above, there was a dual motivation for the discipline of Ferguson. In such instance, the Board has instructed in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), as follows:

> . . . [W]e shall henceforth employ the following causation test in all cases alleging a violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Respondent amply demonstrated that it was urgently concerned with production standards and what it perceived to be employees' misuse of the reporting of their work, to the detriment of Respondent's financial condition—and that employees had notice of Respondent's concern. Merely because Ferguson was a union representative does not insulate him from rules which were applicable to all employees. Because of his erroneous time slip, or at least Respondent's conception of Ferguson's error, Respondent disciplined Ferguson. Ferguson's error was no mere pretext for the discipline. Indeed, only 5 weeks before, Respondent had first discharged employee Blair Baldwin for falsifying his time record and, only after the grievance machinery had been invoked, did Respondent reduce the discipline to a 30-calendar day suspension, with a 1-year probation period.[9] No claim has been made that Baldwin was disciplined because of his union activities. Further, the reduction of Ferguson's discipline was specifically based on Ferguson's admission that he was guilty of the offense with which he was charged. Finally, even assuming that Ferguson admitted only to having made an inadvertent error, I find that Respondent was primarily motivated by its sincere belief that Ferguson was more culpable than he professed at the hearing. I conclude that Respondent has more than adequately proved that it was primarily motivated by what it perceived to be a gross violation of its rules against "banking" and that it would have disciplined Ferguson even in the absence of Ferguson's arguably protected conduct.[10]

Accordingly, based on the above findings of fact and conclusions of law, which are in turn based on the entire record in this proceeding, including my observation of the demeanor of the witnesses as they testified, and my consideration of the briefs filed by the General Counsel and Respondent, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The complaint is hereby dismissed in its entirety.

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charge relating to an alleged 8(a)(5) violation he had been processing and that he had been otherwise active in processing recent grievances. But it is also true that Ferguson had been active in the Union for 10 years that he had by his own admission processed 900 grievances, and that Respondent had apparently not disciplined him before. I further reject the General Counsel's contention that a statement in the settlement agreement indicating Respondent's hope that the incident would have a favorable impact on Ferguson was indicative of Respondent's attempt to discourage him from further union activities. Ferguson had earlier stated to Eckert that he did not care what Respondent did; he was going to get his money. That is sufficient to prompt Respondent's reply.

[9] Ferguson's suspension was a bit longer, because it was computed on the basis of workdays. However, no probationary period was attached to the suspension. I find the different discipline unimportant. It is clear that Respondent did not desire to be wedded to mitigating the penalty for every dischargeable offense or to a definite penalty for the offense of "banking."

[10] In light of my disposition of the merits of the allegations of the complaint, I find it unnecessary to dispose of Respondent's motion to defer to the parties' settlement agreement and to estop Ferguson from asserting the instant claim because of his acceptance of the suspension as a complete resolution of his grievance. I note that the parties never specifically discussed whether discipline was meted out because Ferguson was a union representative. However, questions were raised whether Ferguson was singled out for discipline, an issue specifically raised by the General Counsel in support of the complaint. See, e.g., *Roadway Express, Inc.*, 246 NLRB 175 (1979); *Central Cartage Company*, 206 NLRB 337 (1973).

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.